Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1925

In The

Supreme Court of the United States

October Term, 1981

UNITED TRANSPORTATION UNION,

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

BRIEF FOR NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AS *AMICUS CURIAE*

MARTIN L. BARR
Counsel
NYS Public Employment Relations Board
50 Wolf Road, Fifth Floor
Albany, New York 12205
(518) 457-2678

Of Counsel:
RICHARD A. CURRERI
JEROME THIER
ANTHONY CAGLIOSTRO

TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Statement of Interest	1
Preliminary Statement	2
Summary of Argument	4
ARGUMENT	
The Taylor Law, like the RLA, is a comprehensive, integrated scheme of regulation of employer-employee relationships which can be effectively administered only on a unified basis. Whichever statute governs the labor relations of the LIRR should govern in its entirety to the exclusion of the other.	5
Conclusion	18

TABLE OF AUTHORITIES

Cases:	Page
Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977)	8
City School District of New Rochelle, 4 PERB ¶3060 (1971)	12
Civil Service Employees Ass'n v. *Helsby*, 21 NY2d 541 (1968)	12
Civil Service Employees Ass'n v. *Helsby*, 32 AD2d 131 (1969) *aff'd.* 25 NY2d 842 (1969)	16
Mtr. of Long Island Railroad Company and Staten Island Rapid Transit Authority, 8 NMB 89 — File No. C-5045	3
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	*passim*
New York City Transit Authority v. *Loos*, 2 Misc.2d 733 (1956), *aff'd.* 3 AD2d 740 (1957)	5
New York State Thruway, 1 PERB ¶399.81 (1968)	16
Petrucci v. *Hogan*, 27 NYS2d 718 (1941)	5
Saratoga Springs City School District v. *PERB*, 68 AD2d 202 (1979); *mot. lv. to appeal den.* 47 NY2d 711 (1979)	13
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959)	17
State of New York, 1 PERB ¶399.85 (1968)	16
State of New York and Committee of Interns and Residents, et al., 12 PERB ¶3092 (1979)	14
United Transportation Union v. *Long Island Railroad and Metropolitan Transit Authority*, 634 F2d 19 (1980)	2
West Irondequoit Teachers Association v. *Helsby*, 35 NY2d 46 (1974)	13

Page

Statutes and Rules:

29 U.S.C. §§151 *et seq.* (National Labor Relations Act). 11

45 U.S.C. §§151 *et seq.* (Railway Labor Act) ..... *passim*

New York Civil Service Law (CSL) §§200 *et seq.* (Taylor Law) ..... *passim*

1947 N.Y. Laws, Chapter 391 (Condon-Wadlin Act) ... 5

1967 N.Y. Laws, Chapter 392 5

1969 N.Y. Laws, Chapter 24 7

1974 N.Y. Laws, Chapters 724 and 725 10

Official Compilation Codes, Rules and Regulations of the State of New York, Title 4, §204.4 13

Miscellaneous:

J. Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law,* 37 Fordham Law Review 517 (1969) 16

Governor's Committee on Public Employee Relations, *Final Report, March 31, 1969* (Final Report) ..... *passim*

H. Wellington and R. Winter, Jr., *The Unions and the Cities,* (1971) 8

National Mediation Board, *Annual Report of the Fiscal Year Ended September 30, 1979* 16

E. Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation,* 67 Michigan Law Review 1001 (1969) 16

The Select Joint Committee on Public Employee Relations, *1969 Report* 11

In The

Supreme Court of the United States

October Term, 1981

No. 80-1925

UNITED TRANSPORTATION UNION,

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

BRIEF FOR NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD AS *AMICUS CURIAE*

STATEMENT OF INTEREST

The Public Employment Relations Board is the independent agency of the State of New York responsible for the administration of the dispute resolution procedures established by New York's Taylor Law (New York Civil Service Law, Sections 200-214). Resolution of the issues in this case will directly affect the jurisdiction of the Public Employment Relations Board and its administration of the Taylor Law. The Public Employment Relations Board takes no position on whether the operations of the Long Island Railroad Company should be considered an integral or traditional governmental function within the intendment of the *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), nor whether the Taylor Law or the Railway Labor Act

should apply to the employer-employee relations of the Long Island Railroad Company. It is the concern of the Public Employment Relations Board that this case not result in bifurcated federal/state jurisdiction; either the Taylor Law in its entirety or the Railway Labor Act in its entirety should apply.

In view of these interests, the New York State Public Employment Relations Board ("PERB") respectfully submits this brief *amicus curiae*.

PRELIMINARY STATEMENT

The PERB's concern in this case involves the uncertain scope of the decision of the U.S. Court of Appeals for the Second Circuit under review herein.[1] Did that Court conclude that the Taylor Law, in its entirety, should be applicable to the LIRR and its employees? Or, on the contrary, did the Court determine that only the strike prohibition of the Taylor Law is applicable, while the remainder of that Law is preempted by the Railway Labor Act? Or, did the Court intend some other division of responsibility between federal and state law?

On the one hand, the Second Circuit, in its opinion, states that the "question" presented to it is whether the employees of the Long Island Railroad Company ("LIRR") are subject to the provision in the Taylor Law prohibiting strikes by public employees or to the provision in the Railway Labor Act ("RLA") allowing for such self help. On the other hand, the heart of the Second Circuit's opinion is its interpretation and application of *National League of Cities* v. *Usery*. In its analysis, the Second Circuit recognizes that the "strike" issue is part of a larger concern. Thus, the Court below states: "There is no question but that, as in *National League of Cities*, the operation of the Federal statute directly displaces the State's

---

[1] *United Transportation Union* v. *Long Island Railroad Company and Metropolitan Transit Authority*, 634 F2d 19 (1980).

ability to structure its employer-employee relations and to make essential governmental decisions" (at p. 25). In addition, the Second Circuit asserts: "By precluding the State from enforcing this legislation, including its no-strike provision, the Railway Labor Act eliminates a key provision in the State's legislative effort to provide its citizens with continuous public transportation" (at p. 25).

The PERB's concern is in no way theoretical or simply academic. Rather, the Second Circuit's decision has engendered real and immediate confusion and conflict as evidenced by the action of the National Mediation Board ("NMB") in response to that decision. In an Interim Order issued on March 8, 1981 *(Matter of Long Island Railroad Company and Staten Island Rapid Transit Authority,* 8 NMB 89 — File No. C-5045), the NMB viewed the Second Circuit's decision as holding that there is concurrent RLA-Taylor Law jurisdiction. Finding that the Second Circuit, in effect, "destroyed" the RLA's "comprehensive" dispute resolution scheme by "superimposing" upon it the Taylor Law's strike prohibition, the NMB determined that it would withhold mediation services so as to permit the PERB to render its dispute resolution services exclusively. It further concluded, however, that the Second Circuit only examined the mediatory functions of the RLA and its interplay with the Taylor Law, and that the Court gave no indication that it intended to change the representation rights or grievance and arbitration procedures available to LIRR employees under the RLA. As such, the NMB determined that the Second Circuit's decision did not require it to "cede" its jurisdiction in representation disputes, i.e., the choosing of collective bargaining representatives,[2] or in the settlement of minor disputes, i.e. grievance and arbitration procedures.

---

[2]Notwithstanding the NMB's Interim Order, the LIRR has filed a decertification petition with the PERB in relation to all of its existing bargaining units. The PERB has advised the parties that it will not process the petition until this Court has decided this case. This is further evidence of the real and immediate confusion and conflict which has been engendered by the Second Circuit's decision.

The PERB does not disagree with the NMB in its view that the RLA is a comprehensive plan which should not be segmented. The Taylor Law, however, is also a comprehensive plan. The PERB believes that the NMB in construing the Second Circuit's decision as requiring that it "cede" only its mediation function to the PERB, created an unworkable scheme which could not have been intended by this Court when it decided *National League of Cities*. This Court there held that the State's ability to structure employer-employee relationships in areas of "integral" or "traditional" governmental functions is an attribute of sovereignty which may not be impaired by Congress. Any bifurcation of authority between the RLA and the Taylor Law will effectively destroy the attribute of sovereignty sought to be shielded under *National League of Cities*, namely, the structuring of employer-employee relationships. The Taylor Law does not structure such relationships simply through prohibiting the strike any more than the RLA does so merely by allowing for such self-help. If the Second Circuit's decision is upheld by this Court, the Taylor Law, in its entirety, should be applicable to the employer-employee relations of the LIRR. PERB respectfully submits that the only appropriate alternative to such result is a determination that no part of the Taylor Law — including the strike prohibition — should be applicable to such relations.

SUMMARY OF ARGUMENT

The Taylor Law is a comprehensive, integrated scheme of regulation, the components of which cannot be segregated and still have meaning. The provision of that Law prohibiting strikes is one part of a unified State policy structuring public employer-employee relations. The various dispute resolution procedures contained in that Law are intended to provide an effective alternative to the strike. To continue the prohibition against the strike while denying the applicability of the remainder of the Taylor Law would destroy the balance which

the State Legislature intended when it enacted the Taylor Law. Either the entire policy of the State regarding public employer-employee relations should be shielded from federal interference pursuant to *National League of Cities* v. *Usery*, or no part of it — including the strike prohibition — should be shielded. This Court should not countenance a result which would leave two distinct law-making sources, based on fundamentally different premises, to govern separate aspects of the employer-employee relations of the LIRR.

ARGUMENT

The Taylor Law, like the RLA, is a comprehensive, integrated scheme of regulation of employer-employee relationships which can be effectively administered only on a unified basis. Whichever statute governs the labor relations of the LIRR should govern in its entirety to the exclusion of the other.

The Taylor Law represents a significant and far-reaching change in New York's public policy regarding strikes by public employees. Prior to its enactment in 1967,[3] the only statute dealing with the subject — the Condon-Wadlin Act[4] — simply prohibited strikes and mandated severe penalties for its violation. In large measure, the Condon-Wadlin Act proved unenforceable and was generally recognized as an inadequate response to the needs of public employees.

In 1966, Governor Rockefeller requested a distinguished group of experts, popularly called the Taylor Committee, to "make legislative proposals for protecting the public against

[3]New York Laws of 1967, Chapter 392, codified as New York Civil Service Law ("CSL") Sections 200-214.

[4]New York Laws of 1947, Chapter 391. Strikes by public employees were illegal under the common law of New York (see *Petrucci* v. *Hogan*, 27 NYS2d 718 (1941) and *New York City Transit Authority* v. *Loos*, 2 Misc.2d 733 (1956), aff'd 3 AD2d 740 (1957).

the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees."[5] The Taylor Committee summarized its assessment of the problem as follows:

> Despite many complexities, we believe it is both feasible and desirable to develop a system of effective collective negotiation in the public service. This can be achieved in a manner which is consonant with the orderly functioning of a democratic government. It cannot be achieved by transferring collective bargaining as practiced in the private enterprise sector into the governmental sector. New procedures have to be created.[6]

The Condon-Wadlin Act was repealed and new procedures were embodied in the Taylor Law. In accordance with the recommendations of the Taylor Committee, the Taylor Law contained the following important elements:

1. Public employees were granted the right to collective bargaining through representatives of their own choosing and public employers were required to bargain collectively with the duly recognized or certified representatives;

2. Procedures were established to provide a dependable representation status for recognized or certified employee organizations;

3. Criteria for the definition of appropriate bargaining units were established "which square with the characteristics of the public employment relationship and with the joint responsibility of the employees and

---

[5]The Governor's announcement is quoted in *Governor's Committee on Public Employee Relations, Final Report, March 31, 1966*, p. 9 (hereinafter, "Final Report"). The five experts were George W. Taylor, Chairman; E. Wight Bakke, David L. Cole, John T. Dunlop and Frederick H. Harbison.

[6]Final Report, p. 19.

administrators for the effective performance of their mission, namely, to serve the public";[7]

4. Dispute settlement procedures were established for the orderly resolution of impasses in collective negotiations;

5. A public employment relations board was created to assist in resolving representation and negotiation disputes between public employers and public employees; and

6. The prohibition against strikes was continued and penalties were provided for violation of such prohibition.

One basic change in the Taylor Law occured in 1969 when it was amended to incorporate improper labor practices by public employers and employee organizations and to empower the PERB to establish procedures for the prevention of such practices.[8]

It is submitted that the following analysis will make clear that the Taylor Law's component parts — its strike prohibition, its impasse resolution procedures and its improper practice and representation provisions — are all intimately intertwined and form a unitary scheme of dispute resolution. As the Taylor Committee stated: "The avoidance of the strike is substantially the perfection of procedures and policies to provide an effective alternative to conflict."[9]

---

[7]Final Report, p. 23.

[8]New York Laws of 1969, Chapter 24, codified as New York Civil Service Law §§205.5(d) and 209-a.

[9]Final Report, p. 33.

Impasse Resolution Procedures

The impasse resolution procedures developed under the Taylor Law are an integral and essential component of the strike prohibition. One purpose of the Taylor Law is to provide an "effective alternative" to the strike through its impasse resolution procedures. Without such procedures, the basic intent of the Legislature in continuing the strike prohibition is destroyed.

This Court has previously had occasion to recognize "the important and often-noted differences in the nature of collective bargaining in the public and private sectors."[10] Those differences need not here be recounted but they do exist if only because "government is not just another industry."[11] These differences, in large measure, underlie the continuing search for an acceptable answer to the problem of "finality" in public sector labor negotiations. When bargaining does not produce an agreement, what methods or mechanisms for the resolution of impasses in collective bargaining in the public sector are feasible and desirable other than the strike?

The Taylor Law has mustered an arsenal of persuasive weapons to assist the parties to reach agreement. Thus, if an impasse is determined to exist, the PERB appoints a mediator to assist the parties (CSL §209.3(a)). If the impasse continues, the PERB appoints a factfinding board, with the power, *inter alia*, to make public recommendations for the resolution of the dispute (CSL §209.3(b)). Such public reports and recommendations have a special relevance when the public's business is involved. Aside from the public's right to be informed on the

---

[10] *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 227 (1977).

[11] H. Wellington and R. Winter, THE UNIONS AND THE CITIES (1971), p. 202.

issues, they may provide a basis to crystallize thoughtful public opinion and news media comment. If the factfinding report does not resolve the dispute, the PERB has the power "to take whatever steps it deems appropriate to resolve the dispute" including making recommendations for settlement, providing further conciliation efforts and assistance in providing for voluntary arbitration (CSL §209.3(d)). The PERB often provides post-factfinding mediation which can involve a more aggressive intervention strategy by the neutral. Where the strike is prohibited, the mediator cannot simply walk away from the table and allow the strike to occur. Intensive, ongoing conciliation efforts are an essential aspect of the impasse resolution process.

In view of the strike prohibition, the Taylor Law's impasse procedures must be flexible enough to accommodate the specific needs of the parties. Thus, the Taylor Law mandates no single procedure or style of dispute settlement. In its administration of this statute, the PERB has often blurred the distinction between mediation and factfinding by assigning a factfinder at the first stage of the impasse under the assumption that he or she will attempt to mediate the dispute prior to conducting a formal hearing. This procedure may reduce the parties' incentive to delay and to hold back concessions. In addition to these PERB-administered procedures, the Taylor Law encourages public employers and employee organizations to agree to their own impasse resolution procedures. Such agreed-upon procedures must fail to achieve a settlement before the PERB will render assistance (CSL §209.2). Parties are free, therefore, to experiment and revise procedures in light of their experience.

Only if all these efforts fail is the legislative body of the public employer empowered, after public hearing, to act as the final arbiter by taking "such action as it deems to be in the

public interest, including the interest of the public employees involved" (CSL §209.3(e)).[12]

Contrary to the private sector, the Taylor Law procedures do not rest upon the basic assumption that the availability of the strike weapon is essential to induce compromise and ultimate agreement by the parties. The varied methods of persuasion developed under the Taylor Law, together with PERB's familiarity with the disputants and their disputes, as well as political activity by employees short of the strike, have proven to be a feasible alternative to the strike.[13] To continue the strike prohibition while denying the applicability of these procedures would destroy the structure that the Legislature intended to establish. This Court should not apply *National League of Cities* so as to shield the strike prohibition if the impasse procedures of the Taylor Law are not applicable.

Improper Employer and Employee Organization Practices

The improper practice powers of the PERB are an integral component of the Taylor Law structure and cannot be segregated from the PERB's other dispute resolution powers. By virtue of its power to remedy improper practices, PERB,

---

[12]Final Report, p. 39:

"It is ultimately the legislature and the political process which has to balance the interests of public employees with the rest of the community, to relate the compensation of public employees to the tax rate, and to appraise the extent and quality of public services and the efficiency of their performance to the aspirations of public employees. The methods of persuasion and political activity, rather than the strike, comport with our institutions and traditions as means to resolve such conflicts of interest. It is these methods, moreover, that have been utilized by the wide variety of employee organizations which are indigenous to public employment."

[13]Compulsory binding arbitration, as the final step in the resolution of impasses involving police and firefighters was added to the Taylor Law in 1974 (Chapters 724 and 725 of the Laws of 1974). In the same year, the role of the legislative bodies of school districts as final arbiters was withdrawn.

inter alia, regulates and defines the conduct and subject matter of collective negotiations. The availability of the improper practice mechanism and the parties' knowledge that PERB stands ready to affirmatively remedy breaches of proper conduct serve as significant deterrents against activity that might otherwise foment an illegal strike. The Legislature, in amending the Taylor Law to provide for improper practice procedures and remedies, recognized the need to provide balance if its strike prohibition was to be effective:

> The new amendments also sought to correct a number of problems which, it was felt, contributed to the occurrence of strikes. The law codified improper employer and employee practices and specifying [sic] remedies so as to enable PERB, acting on the request of a party, to correct an improper advantage gained by a party, and to encourage proper and orderly negotiations.* * *[14]

In regard to improper practices, the Legislature was especially concerned that distinctions be recognized between labor relations in the public sector and labor relations in the private sector.[15] Thus, §209-a.3 of the Taylor Law provides:

> Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.

---

[14] *The Select Joint Legislative Committee on Public Employee Relations, 1969 Report,* p. 12 (hereinafter "1969 Report").

[15] This concern is also reflected in the Legislature's use of terminology which differs from that used in the private sector. Thus, the Taylor Law's prohibited "improper practices" parallel but are not identical to the "unfair labor practices" prohibited under the National Labor Relations Act. Similarly, the Legislature's use of the term "collective negotiations" rather than "collective bargaining" was both intentional and significant. 1969 Report, at 14-15.

These distinctions are particularly relevant in a recurring area of dispute in collective negotiations under the Taylor Law, involving the line to be drawn between those subjects which are "terms and conditions of employment" that must be negotiated by the public employer with the union representing the employees and those matters of policy or management which should be reserved to the normal, political decision-making process of the public employer. In short, in the public sector the question of the proper scope of bargaining is intimately related to the fact that "government is not just another industry." How can bilateral decision-making be reconciled with the responsibilty of the government to the general public?

In an early decision,[16] the PERB outlined the public sector considerations that dictate a special response to this issue:

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees. [footnote omitted] Here there must be noted a substantial difference between private employers and public employers, for the latter "owe a very special obligation to the public not owed by private employers . . ." [*Civil Service Employees Association* v. *Helsby*, 21 NY2d 541 (1968)]

---

[16] *City School District of New Rochelle*, 4 PERB ¶3060 (1971).

The public sector test of negotiability formulated by the PERB on the basis of these special considerations has been upheld by the New York courts.[17]

It is by virtue of the PERB's authority to establish procedures for the prevention of improper practices, including the refusal to negotiate in good faith, that PERB is empowered to decide scope of bargaining issues. Improper practice charges raising such issues are filed during the course of collective negotiations. Because prompt resolution of these questions is essential to the maintenance of a peaceful and orderly collective negotiation process, the PERB has adopted special rules governing the expedited determination of such cases.[18] It is evident that if the strike weapon is not available to employees, effective and equitable dispute resolution requires the exercise by PERB of its power to prevent improper practices.

If this Court applies *National League of Cities* in such manner as to shield only the strike prohibition of the Taylor Law, then the improper practice jurisdiction of the PERB would not be applicable to the LIRR and its employees. This result would destroy the balance that the Legislature intended to establish when it sought to prevent improper practices which contribute to the occurrence of strikes. Many types of improper practices, in addition to those involving scope of bargaining issues, such as refusals to bargain in good faith, and coercive and discriminatory practices, can be directly related to the negotiation process and should, therefore, be dealt with by the PERB if the strike prohibition of the Taylor Law applies. On the other hand, the PERB believes that the strike prohibition

---

[17] *West Irondequoit Teachers Assoc.* v. *Helsby*, 35 NY2d 46 (1974); *Saratoga Springs City School District* v. *PERB*, 68 AD2d 202, 209 (3rd Dept., 1979), mt. lv. app. den. 47 NY2d 711 (1979).

[18] Official Codes, Rules and Regulations of the State of New York, Title 4, §204.4.

ought not to be applicable if the PERB's improper practice procedures are not available to the affected employees.

Determination of Representation Status

The Taylor Committee phrased a basic premise of the Taylor Law in these words:

> "It is elementary justice to assure public employees, who are estopped from using the strike, that they have the right to negotiate collectively . . . If collective negotiations are to resolve issues in the public employment relationship peacefully, the foundation for that result must be laid in effective procedures to establish representation status for the organizations which conduct the negotiations on behalf of the employees. That foundation has not been laid by statute in New York State."[19]

The Taylor Law provides effective procedures to establish a dependable representation status. They authorize recognition of an employee organization by the public employer in the absence of a dispute, and certification by the PERB where there is a dispute. The employees' choice of employee organization as their representative must be ascertained by evidence of majority status, to be established by conducting an election, if necessary (CSL §207.2). To be recognized or certified, the employee organization must affirm that it does not assert the right to strike (CSL §207.3). This "no strike" affirmation is not a meaningless formality. PERB has dismissed a certification petition filed by an employee organization when, during the pendency of such petition, the organization violated its affirmation.[20] Of larger significance, the "no strike" affirmation, as a prerequisite to representation status, goes hand

---

[19]Final Report, p. 20.

[20]*State of New York and Committee of Interns and Residents, et al.*, 12 PERB ¶3092 (1979).

in hand with the prohibition against strikes, and sets the tone for subsequent negotiations.

In determining the representation status of the employee organization, the appropriate bargaining unit must be defined in accordance with specified statutory criteria:

> (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;
>
> (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment upon which the employees desire to negotiate; and
>
> (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.[21]

These criteria mandate consideration of the special characteristics of the public employment relationship and the joint responsibility of both employees and employers to serve the public in an effective and peaceful manner. These factors differ markedly from those under the RLA. Under that Act:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act.[22]

Due to the differing mandates of the Taylor Law and RLA criteria, the respective approaches of the PERB and the NMB to the question of unit definition must necessarily differ. Based upon the RLA criteria, the NMB grants each craft or historical class of employees its own representative for bargaining

---

[21]CSL §207.1.

[22]RLA Sec. 2, Fourth.

purposes. Thus the NMB has established some 20 crafts or classes into which it units the employees of rail carriers.[23] PERB, on the other hand, in response to the Taylor Law criteria, has followed a policy which generally favors larger units along merged occupational lines, at least where there exists no prior negotiating history between the parties.[24] By avoiding the proliferation of smaller units, PERB's policy affords public employers the administrative convenience needed to serve the public, and enables them to maintain some semblance of uniformity in benefits and working conditions. From the standpoint of the public employees, PERB's policy is tied directly to the fact that they lack the right to strike. Where, as under the RLA, the strike weapon is available, smaller units can adequately serve the needs of employees. The economic power wielded by each such unit can have a formidable impact upon the employer. Where, however, as under the Taylor Law, employees are prohibited from striking, their goals can be obtained only through negotiations and resort to the political process. Larger units, by virtue of their size, can exert greater political pressure and may, therefore, be better suited to pursue the employees' demands more effectively.

The PERB does not intend to imply in any way that the public sector considerations underlying the Taylor Law criteria are more appropriate for the operations of the LIRR than the private sector considerations underlying the RLA criteria. Neither is it the PERB's position that other factors, such as the

---

[23]National Mediation Board, *Annual Report for the Fiscal Year Ended September 30, 1979*, pp. 24-25.

[24]*State of New York*, 1 PERB ¶399.85 (1968); *New York State Thruway*, 1 PERB ¶399.81 (1968); *Civil Service Employees Association* v. *Helsby*, 32 AD2d 131 (1969), aff'd 25 NY2d 842 (1969). See also Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 Fordham Law Review 517 (1969); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 Michigan Law Review 1001 (1969).

past history of bargaining between these parties, would not be relevant should PERB, as a result of this case, hear the pending representation petition filed with it by the LIRR (see fn. 2, supra.). The PERB simply desires to point out that such criteria have relevance only in the context of the particular labor relations scheme of which they are a part, and cannot be separated from the differing considerations underlying those structures.

The statutory provisions for establishing representation status, therefore, are an integral component of the Taylor Law scheme of regulation. The policy underlying the Taylor Law will be severely impaired by a regulatory scheme which leaves important representation issues to be resolved by the NMB while permitting related disputes to be determined by the PERB. It is respectfully submitted that this Court should not exclude this important area of dispute resolution from the reach of its analysis.

* * * * *

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-2 (1959), this Court observed:

> In determining the extent to which state regulation must yield to subordinating federal authority, * * *[w]e have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes.

The PERB respectfully submits that a comparable concern for the potential conflict inherent in allowing two law-making sources to govern is warranted in determining the extent to which, if at all, the provisions of the RLA are constitutionally invalid under the reasoning of *National League of Cities* v. *Usery*, if applied to the employer-employee relations of the LIRR.

CONCLUSION

For the foregoing reasons, whichever statute, federal or state, is determined by this Court to govern the employer-employee relations of the LIRR, such statute should be permitted to govern in its entirety to the exclusion of the other.

Respectfully submitted,

MARTIN L. BARR
Counsel
NYS Public Employment Relations Board
50 Wolf Road, Fifth Floor
Albany, New York 12205
(518) 457-2678

Of Counsel:
RICHARD A. CURRERI
JEROME THIER
ANTHONY CAGLIOSTRO

August 24, 1981